



# County of Fairfax, Virginia

## MEMORANDUM

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**DATE:** February 4, 2010

**TO:** Jeffrey C. McKay, Supervisor  
Lee District

**FROM:** David P. Bobzien, County Attorney  
Office of the County Attorney

**SUBJECT:** County Authority to Regulate Liquor Stores if Proposed Legislation Privatizing Such Stores Is Enacted

**REF:** Matter ID 107149

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**THIS MEMORANDUM CONTAINS CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND IS NOT TO BE RELEASED TO THE PUBLIC. THIS MEMORANDUM IS EXEMPT FROM THE DISCLOSURE PROVISIONS OF THE VIRGINIA FREEDOM OF INFORMATION ACT. VA. CODE ANN. § 2.2-3705.1(2) (2008).**

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### INQUIRIES:

1. Does the County have the legal authority to regulate the location of privately owned retail liquor stores?
2. Are privately owned retail liquor stores entitled to any special protection under the United States or Virginia Constitutions?

### OPINIONS:

1. Yes.
2. No.

## **BACKGROUND:**

The General Assembly is considering whether to privatize its Alcoholic Beverage Control ("ABC") stores. As a result, at the Board meeting on January 12, 2010, you and other members of the Board asked this Office to answer the inquiries set forth above.<sup>1</sup>

## **DISCUSSION:**

1. Pursuant to Va. Code Ann. § 15.2-2280 (2008), the County has the authority by means of the Zoning Ordinance to regulate the location of privately owned retail liquor stores. *See City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 423, 281 S.E.2d 836, 841 (1981) (holding that "the ABC [Board]'s exclusive authority to license and regulate the sale and purchase of alcoholic beverages in Virginia does not preclude a municipality from utilizing valid zoning ordinances to regulate the location of an establishment selling such alcoholic beverages," and upholding the validity of a zoning ordinance that prohibited more than two establishments of a certain type, including those that sold alcoholic beverages, from being located within 1,000 feet of each other). *See also County of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 207, 559 S.E.2d 627, 632 (2002) (holding that the defendant was not authorized to sell alcoholic beverages on its property, despite the fact that the ABC Board had granted it a valid license, because the defendant's conditional use permit contained the condition that no alcoholic beverages were permitted on the property).

This Office has been informed by the Zoning Administrator that ABC stores are classified under the Zoning Ordinance as Retail Sales Establishments and that privately owned retail liquor stores would be classified the same way.<sup>2</sup> However, the Board could amend the Zoning Ordinance to regulate privately owned retail liquor stores as a special exception use, provided that such a classification satisfies the criteria set forth in *Board of Supervisors v. Southland Corporation*, 224 Va. 514, 518, 521-22, 297 S.E.2d 718, 720, 722 (1982) (observing that a legislature may require certain uses that it considers to have an undue impact upon neighboring properties or the public or are incompatible with other uses within a zoning district to obtain a special exception). In *Southland*, the Board was able to justify its classification of quick-service food stores as a special exception use by demonstrating, with detailed traffic counts, the amount of traffic congestion caused by quick-service food stores compared to that caused by the uses permitted by right. *Id.* at 521-22, 297 S.E.2d at 722-23. Therefore, under the

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<sup>1</sup> At the Legislative Committee meeting on January 29, 2010, Supervisor Gross also asked whether freestanding ABC stores, if sold to private individuals or companies, would retain their tax-exempt status. The answer to this question is no. There is no legal authority that would exempt privately owned liquor stores from paying the same taxes other retail establishments in the County must pay.

<sup>2</sup> Currently, Retail Sales Establishments are permitted by right in the C-5 District (Neighborhood Retail Commercial District), C-6 District (Community Retail Commercial District), C-7 District (Regional Retail Commercial District), C-8 District (Highway Commercial District), and C-9 District (Super-Regional Retail Commercial District).

Court's holding in *Southland*, to classify privately owned retail liquor stores as a special exception use, the Board would have to have a rational basis for treating such liquor stores differently from other Retail Sales Establishments permitted by right in the applicable zoning districts.

2. Privately owned retail liquor stores are not entitled to any special protection under the United States Constitution because there is no fundamental constitutional right to sell liquor. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1995) (referring to the ability to obtain a license to sell liquor as a benefit that the government is under no obligation to provide). Similarly, it does not appear that privately owned retail liquor stores are entitled to any special protection under the Virginia Constitution. *See Tiny House*, 222 Va. 414, 423, 281 S.E.2d 836, 841 (1981). Therefore, the constitutionality of any proposed regulation that would treat privately owned retail liquor stores differently from other Retail Establishments in the County would depend entirely on whether there is a rational basis for doing so. *See also City of Manassas v. Rosson*, 224 Va. 12, 18, 294 S.E.2d 799, 802 (1982) (observing that when a land use permitted to one landowner is denied to another similarly situated, the restriction constitutes a denial of equal protection unless the law "bears 'a rational relationship to a [permissible] state objective'" (quoting *Village of Bell Terre v. Boraas*, 416 U.S. 1, 8 (1974) (alteration in original))).

#### **CONCLUSIONS:**

1. The Board is authorized under Va. Code Ann. § 15.2-2280 to regulate by means of its Zoning Ordinance the location of privately owned retail liquor stores. However, if the Board wants to treat privately owned liquor stores differently from other Retail Sales Establishments in the County, a rational basis would have to be articulated for doing so.
2. Privately owned retail liquor stores are not entitled to any special protection under the United States or Virginia Constitutions.

Please call me or Assistant County Attorney Laura S. Gori at (703) 324-2668 if you have further questions regarding this matter.

Attachment

cc: Members, Board of Supervisors  
Anthony H. Griffin, County Executive  
Catherine A. Chianese, Assistant County Executive  
James P. Zook, Director, Department of Planning and Zoning  
Eileen M. McLane, Zoning Administrator

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